SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1249

SAMUEL LEHRER,
Defendant-Petitioner,

vs.

THOMAS NICKOLOPULOS,
Plaintiff-Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. Opinions of the Court Below

The decision of the New Jersey Supreme Court is an unreported decision, but the opinion of the Court is set forth in the State of the Case, at page 29.

The opinion of the New Jersey Court of Errors and Appeals is set forth on page 37 of the State of the Case.

2. Statement of the Case

A full statement of the case has heretofore been given under the heading "A" in the petition for the Writ. No useful purpose can be accomplished in repeating said statement in this brief.

3. Specification of Errors

The specification of errors is substantially the same as the reason of the petition for the allowance of the Writ set forth in the petition and may be condensed as follows:

1. The New Jersey Supreme Court by its judgment striking the answer of the defendant, failed to take into consideration the defense set forth in the answer charging that the orders promulgated by the War Production Board frustrated petitioners leases and caused a stricture in his business, not contemplated by the parties at the time that the leases were made.

2. The New Jersey Court of Errors and Appeals failed to find petitioner's lawful right to go to hearing on the question of whether or not, the regulations and rules promulgated by a Federal Governmental Agency terminated his lease.

ARGUMENT

Point One

The Courts Below Erred in not giving and according to the petitioner here (defendant below), his right to have a full hearing on the effect on his lease of duly promulgated Federal regulations.

The New Jersey Court of Errors and Appeals, although clearly recognizing the fact that a Federal question was presented by the answer filed by the petitioner, here as defendant, in the Court below, sidetracked the real issue involved. Judge Thompson writing for the New Jersey Court of Errors and Appeals says (p. 39). "But, in the present case the defendant pleaded the issuance of Government orders "prohibiting the production and sale of the articles set forth in the leases," as a consequence of which

he had been evicted and performance of his contract of lease rendered impossible. The precise orders upon which defendant relied as having accomplished his business ruin was not cited or particularized, but the court, taking judicial notice of such Government orders as did exist having relation to the class of merchandise in question, decided that they did not go to the extent of prohibiting the sale of automobiles, radios, refrigerators, washing machines and other electrical appliances and equipment.

(fol. 40) The court was empowered to take judicial notice of the federal orders in question and of their contents and extent (1) because they were matters of common knowledge through their wide effect on the ordinary life, habits and usages of the general public, and (2) by force of the statute of this State, R. S. 2: 98-28 to 98-30. Furthermore, mere impairment of the beneficial use is not in itself sufficient to warrant termination of lease at the will of the tenant."

Was it not the intent of the Federal Government when setting up the War Production Board and allowing it to promulgate rules and regulations to do so with a minimum amount of discomfiture to the citizens of the Country at large?

We are all agreed that the War effort comes first regardless of political creed. We have had adequate reason to suppose that the pronouncement of our late lamented President placing the needs of the Nation above the needs of any individual, is a method of substantiating the War effort and is the only technique to follow, but this becomes sound law, only because of the Nation's right to preserve its very existence. It does not follow that the chips must fall where they may and it does not follow that a Court by invoking the doctrine of judicial notice can conclude that because there may be two hundred automobiles, one hundred radios, fifty refrigerators and five washing machines in the Country, that the lease in question must be sustained

and the tenant be held to acount for his rent. We do not urge here that the Government as a corollary to creating a war policy must at the same time establish an economical flow of commodities which will enable tenant to stay in the business; what we do contend, is that in each case where the precise question herein involved is raised, the Court must allow a record to be established from which it determines as a preliminary question of law, or a jury determines as a factual question in the case and an Appellate Court may have an opportunity, if called upon to set aside a gross abuse of discretion as to how the particular lease and the particular tenancy were affected by inability to procure and trade in the commodities in question. Both the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals fall into error by not seeing that this is the real situation.

In the State of New York, a different situation seems to obtain. In the case of *Schantz* v. *American Auto Supply Co., Inc.*, 178 Misc. 909, 36 N. Y. S. 2d, 747, the Court refused to strike an answer similar to the one which we filed, and the Court in its decision stated that in an action for rent, under a lease of premises to be used for the sale of enumerated articles, an answer alleging that the tenant had been evicted from the premises by Government order prohibiting the sale of the articles means that the tenant had surrendered the premises and elected to terminate the lease because of the Government's action and stated enough to require any lack of explicitness to be resolved in favor of the pleading. In that case, where the demised premises were to be used for the sale of tires, radios, washing machines, and refrigerators an affirmative defense alleging that the sale of the articles had been prohibited by the United States Government and that as a result of the action of the said Government the defendant was evicted from the premises, was held to be a sufficient answer. As

was said in *Signal Land Corp.* v. *Loescher*, 35 N. Y. S. 2d, P. 25: "Such a Governmental action or decree destroys the subject matter of the contract and makes performance thereof impossible and hereby terminates the lease." In that case it was also held that where the premises were leased for the purpose of carrying on therein the business of selling and installing oil burners, the issuance by the Federal Office of Production Management of priority orders preventing the tenant from carrying on such business rendered his performance of the lease impossible and constituted a good defense to the landlord's action for rent and action for breach of the lease.

In the case of *Port Chester Central Corporation* v. *Leiberts*, 39 N. Y. S. 2d, page 41, decided January 19, 1943, the Court held on a motion to strike an answer that Governmental regulations effected a diminution in the volume of defendant's business, but whether or not this diminution reached such an extent as to result in a frustration in the purposes of the lease cannot be determined solely on the basis of affidavits. The motion to strike the answer was denied.

There is no point in the Court's suggestion that the Government has not done this to these specific premises, but generally. Obviously, we are only concerned with these specific premises. The defense only goes to what happened in these specific premises and the allegations in paragraphs 2 and 3 of the first separate defense are certainly broad enough to cover the premises set forth in the lease. Furthermore, while the Court may take judicial notice of the extent of the Government's action, the Court did not have before it in any of the pleadings the precise orders and regulations which the defendant-appellant relies upon, and the Court furthermore reaches its conclusion without giving the slightest degree of thought as to whether or not there was a condition implied in law that if, as a result of

the Governmental orders, the supply of the commodities in question was so limited that the qualifications of the persons who were entitled to buy were so limited as to amount to a substantial frustration, that then and in that event, the leases were to be terminated. In the case of *Canrock Realty Corporation* v. *Vim Electric Company*, decided August 29, 1942 and reported in 37 N. Y. S. 2d, page 139, the plaintiff brought an action for an installment of rent due under a lease. The defense was that Government regulations have prohibited the defendant from selling radios, radio equipment, electrical equipment, refrigerators, etc., and that by reason thereof it has been deprived of its beneficial rights under the lease. The Court in its opinion stated that it was conceded that there was no Governmental prohibition against the sale of the articles referred to, but that the Government, by its rules, has either prohibited or limited the manufacture of the articles, with the result that the defendant was unable to stock these articles in its warehouse prior to the Governmental limitation on manufacture. The lease contained the following purpose clause.

> "The tenant shall use and occupy the demised premises as a retail store for the sale of radios, radio apparatus, radio repairs, television and apparatus, musical instruments, photographs and records, electrical supplies and appliances, washing machines, refrigerators, toys cameras, oil burners, gas stoves, electric ranges, sporting goods, sportswear, and sporting apparel of every kind, nature, and description and for no other purpose."

Said the Court at page 140:

> "There wouldn't be much doubt that the defendant would be permitted to terminate the lease had the sole purpose for which the premises were leased been for instance the sale of a new automobile which the Government has proscribed or the sale of washing ma-

chines, refrigerators, electric ranges, etc., which the Government has forbidden to be manufactured."

and further on:

"There is conflict of authority in various states in this country upon the question of law here presented, but the weight of authority seems to be to the effect that if a Governmental act or decree destroys the subject matter of the contract and makes performance impossible that that thereby terminates the lease. The parties to the lease are presumed to have contracted with a view to the law as it existed at the time the lease was made.

To hold them bound to anticipate future legislation would be the equivalent to making them obligate themselves to the performance of conditions prescribed by others, which in the nature of things could not have been within the contemplation of the parties at the time the contract was made.

If the tenant is deprived by Governmental regulations of the beneficial use of the property so that it prevents him from using it for the primary and principal use for which it was rented the lease is terminated although other incidental uses might still be made of it."

Again at page 141:

"The question here is have the Government regulations prevented the tenant from using the premises for the primary purpose for which he leased it and in my opinion that presents a question of fact which cannot be resolved on the motion for summary judgment. The defendant says he cannot obtain merchandise for sale by reason of the Government restrictions. The Plaintiff says this is not so because its other stores are stocked with the very articles which it says it cannot obtain. Again the defendant says that over 90% of its business consisted in the merchandising of articles which the Government will no longer permit to be

manufactured, as a result of which it cannot obtain them for sale. This likewise plaintiff denies.

Defendant is entitled to his day in Court for an opportunity to prove that the primary and principal purpose for which he leased the premises has been destroyed by reason of Governmental regulations. If that is so, then the defendant can rightfully terminate the lease."

POINT TWO

The Courts Below failed to consider the economic and legal effect of the functioning of the War Emergency Boards, coming into being, since the making of petitioner's lease.

At the time of the making of the leases, the functioning of the War Emergency Board and similar Federal administrative bureaus was not and could not have been within the contemplation of the parties. Where the manufacture of an article has been prohibited, the sale of the article naturally does not follow as a consequence, as where there is no manufacture there is no sale. Of course, at the time that the order freezing manufacture is made there may still be a limited supply of used articles on hand, but where the sale of these is limited to persons holding qualifying certificates which must be procured from Governmental authority and after hearings before administrative boards, it is a fair question whether or not this is not a complete frustration. If it is not a complete frustration, may it not be a sufficiently adequate frustration so that in law it may truthfully be said that the parties had no such situation in mind when the leases were made. If they did not have such a situation in mind, who is going to say and under what circumstances will enough be said to relieve a tenant from his presumptive obligation under the lease? Will a Court do this alone by examining pleadings which squarely put this issue before it? Will the Court do this without asking what orders o

regulations he relies upon? Will a Court do this without sworn testimony before it, showing the effect on the premises in question of the orders? Suppose that at the time the general sale of new automobiles is prohibited there are a million of them in the country, half a million of them being in California and twenty of them being in New Jersey. Is the Court going to take testimony and inquire as to how these orders affected this particular lease and sales at this particular location, or is it going to brush all of this off, *although for the purposes of this motion the allegations in our answer state that our leases were terminated because of the Governmental regulations and orders?* The New York Courts refuse to move even on affidavits. The New York Courts will not enter summary judgment in a case of this kind without a full hearing before the Court. Questions of fact belong to the jury in this type of case, as in any other case. The time for the Court to pass upon the law of the situation is after it has heard all of the facts and has had the orders and the precise regulations affecting the situation clearly before it.

Conclusion

The issues raised in this cause and incorrectly decided below, present a legal problem arising in our day which clearly requires clarification in this Court.

We, therefore, respectfully urge that a Writ of Certiorari be granted in this case to review and correct the judgment of the New Jersey Court of Errors and Appeals.

Respectfully submitted,

JOSEPH STEINER,
Of Counsel with Petitioner.